

CHAPTER I

INTRODUCTION

1.1 Background of Research

Due to the rapid development of globalization, people are increasingly influenced by its effects which have significant impact on moral values. One of the impacts that is felt today is the demand for promiscuity.¹ Moral and religious values are gradually being ignored in social life. So that the weak faith and lack of religious knowledge make the association between men and women cross the line. This is the cause of the rampant act of adultery and the perpetrator of adultery considers that committing adultery is a normal thing to do.²

Adultery (*Zina*) is a reprehensible act that undermines the cultural values of Indonesian society, which are rooted in manners and morals.³ In legal terms, adultery is interpreted as overspel, referring to the act of a married individual engaging in a relationship with another person outside their marriage, provided there is a complaint from the aggrieved.⁴ If one spouse has physical relations with another person and there is no complaint from the husband or wife, the act is not classified as adultery under the law. Therefore, adultery, as defined by the law, is applicable only when it involves a married person and is accompanied by a formal complaint.⁵ This interpretation aligns with article 284 of the Indonesian Criminal Code (*KUHP*).

In Islamic criminal law, adultery is considered a major sin. The meaning of *zina* according to Islamic law is a sexual relationship between a man and a woman without a valid marriage.⁶ In contrast to the secular law, in Islamic law it is said that

¹ Nunung Dian Wahyuningsih, "Perbandingan Hukum Perzinahan dalam UU No. 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP) dengan Hukum Islam," *Journal of Law Society, and Islamic Civilization*, 2023, 102.

² Ibid.

³ Hadziq, Sahran. "Pengaturan Tindak Pidana Zina Dalam KUHP Dikaji Dari Perspektif Living Law." *Lex Renaissance*, No 1, (2019): 40.

⁴ Eko Sugiyanto et al, "Kebijakan Hukum Pidana Dalam Upaya Penanggulangan Tindak Pidana Perzinahan," *Diponegoro Law Journal*, Nomor 3, Volume 5 (2016), 1.

⁵ Neng Djubaedah, *Perzinaan: Dalam Peraturan Perundang-undangan di Indonesia Ditinjau dari Hukum Islam*, (Kencana, Jakarta, 2010), 182-183.

⁶ Ibnu Rausyd, *Bidayatul Mujtahid*, Jilid 5, (Jakarta, Pustaka Amani, 1995), 231.

zina is not only for married people, but also applies to unmarried people.⁷ With the concept of the crime of adultery in Islamic law, it does not refer to the status of adulterers, men and women, both married and unmarried, if they have sexual intercourse outside of marriage, they can be threatened with sanctions in accordance with the provisions of Islamic Criminal law.

In general, the purpose of criminal law is to create a deterrent effect. In addition, another purpose of criminal law is to protect every citizen from harmful criminal acts.⁸ So with this, efforts to prevent someone from committing adultery require rules that strictly regulate sanctions against adulterers. So that it can provide a deterrent effect and prevent or reduce the occurrence of adultery crimes.

The crime of adultery has actually been regulated in Article 284 of The Criminal Code (KUHP). However, the provisions in article 284 of the Criminal Code can be said to be ineffective in dealing with the problem of adultery. This is because the provisions of the act of adultery in this article refer to the status of the perpetrator of the crime of adultery. Where it is said that the crime of adultery is if the perpetrator of adultery is married, so that if the perpetrator is both unmarried, he cannot be prosecuted for the act of adultery.⁹

The provisions in article 284 are also not effective in providing a deterrent effect to perpetrators of adultery crimes. Because in this article it is an absolute complaint, which means that it cannot be sued if there is no complaint from the husband or wife who feels aggrieved.¹⁰ Therefore, a legal update is needed to article 284 of the Criminal Code, in order to be in harmony with the values of the nation and religion.¹¹

⁷ Neng Djubaedah, *Perzinaan: Dalam Peraturan Perundang-undangan di Indonesia Ditinjau dari Hukum Islam*, (Kencana, Jakarta, 2010), 182-183.

⁸ Syarif Saddam Rivanie et al., "Perkembangan Teori-teori Tujuan Pemidanaan," *Halu Oleo Law Review* Volume 6, no. Issue 2 (2022), 180.

⁹ Syamsul Huda, "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana," *Hunafa: Jurnal Studia Islamika* Vol.12, no. Issue 2 (2015): 378. <https://repository.iainkediri.ac.id/>.

¹⁰ Fikarman Bawamenewi, "Efektivitas Penyelesaian Tindak Pidana Perzinahan Yang Dilakukan Secara Hukum Adat," *JPH: Jurnal Panah Hukum* Vol. 2 No. 1 (2023), 185.

¹¹ Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat dalam Wacana dan Agenda*, Cetakan Pertama, (Gema Insani Press, Jakarta, 2003), 124.

The issue of adultery is something that is very important to pay attention to. The influences of western thought and the ideological understanding of liberalism and secularism have a huge impact on today's society.¹² Therefore, the Indonesian people need to understand how bad adultery is. Because the act of adultery has a bad impact on life.

One of the impacts of adultery is the social impact. The social impact is that the perpetrators of adultery will get a bad view from the community.¹³ This is because the community considers it an illegal act and not only violates God's rules, but also contradicts the cultural values and traditions of the community.¹⁴

With the increasing nature of individualism and the emphasis on personal freedom, many modern societies have begun to view adultery as a personal affair that does not have to be governed by strict social or religious norms. This value of personal freedom often shifts the traditional, stricter view of adultery. In addition, the influence of secularization has reduced the role of religion in determining the norms of life. As a result, the view of adultery becomes looser compared to people who are still very religious.

To deal with the problem of adultery, strict and binding rules are needed for adulterers to have a deterrent effect.¹⁵ So that it can reduce or prevent the occurrence of adultery and its adverse impact on the lives of the Indonesian people. Existing laws such as in The Criminal Code (*KUHP*) Article 284 can be said to be ineffective.¹⁶

The challenge in implementation of the punishment of adultery Article 284 of The Criminal Code (*KUHP*) lies in the fact that Indonesian law is largely a

¹² Nunung Dian Wahyuningsih, "Perbandingan Hukum Perzinahan dalam UU No. 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP) dengan Hukum Islam," *Journal of Law Society, and Islamic Civilization*, (2023): 99.

¹³ Rosdalina, *Hukum Adat*, Cetakan Pertama, (Deepublish, Yogyakarta, 2017), 113.

¹⁴ Rahmi Fauziah dan Erianjoni, "Respon Masyarakat Pada Perempuan Yang Hamil Sebelum Menikah (Married By Accident) Di Nagari Sungayang Kecamatan Sungayang Kabupaten Tanah Datar," *Jurnal Perspektif: Jurnal Kajian Sosiologi dan Pendidikan* Volume 2, no. Issue 3 (2019), 306.

¹⁵ Haliman, *Hukum Pidana Syari'at Islam Menurut Ajaran Ahlus Sunnah* (Jakarta: Bulan Bintang, 1970), 399.

¹⁶ Syamsul Huda, "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana," *Hunafa: Jurnal Studia Islamika* Vol.12, no. Issue 2 (2015):, 37. <https://repository.iainkediri.ac.id/>.

product of Dutch legal influence. This has led to differences in legal concepts and philosophies regarding the definition of adultery, which may not fully align with the values of Indonesian society—a society deeply rooted in religious principles. For this reason, it is necessary to reform the law regarding adultery offenses.¹⁷

In addition, the inclusion of absolute complaints and reference to social status makes the application of article 284 of the law considered less effective in handling the crime of adultery.¹⁸ Because in reality adultery that occurs in society is increasingly rampant and considers committing adultery to be a normal act to do. The absence of laws and regulations that are truly binding as well as the demand for individual freedom is a factor that causes promiscuity between men and women to commit adultery.¹⁹

In Islamic Criminal law, it has actually been expressly regulated about punishment for adulterers. The existence of strictness of sanctions in Islamic Criminal law is based on the provisions contained in the Qur'an and hadith for the benefit of the ummah.²⁰ However, the imposition of sanctions in Islamic criminal law is considered to violate Human Rights (*HAM*). However, the government also does not have a law that expressly regulates sanctions or law enforcement for adulterers.

In addition to the issue of adultery in The Criminal Code which is considered incompatible with the values of the Indonesian nation, and the implementation of Islamic criminal law is sometimes criticized for allegedly violating human rights. There is one province in Indonesia that enforces Islamic criminal law, namely the province of Aceh. Aceh Province governs *qanun jinayat* to the adultery offense contained in Qanun Aceh Number 6 of 2014 concerning Jinayat Law. Under this regulation, zina is considered a *jarimah* that can be subject to criminal sanctions and is punishable by a strict sanction of 100 lashes. This

¹⁷ Syamsul Huda, "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana," *Hunafa: Jurnal Studia Islamika* Vol.12, no. Issue 2 (2015): 379. <https://repository.iainkediri.ac.id/>.

¹⁸ Hadziq, Sahran. "Pengaturan Tindak Pidana Zina Dalam KUHP Dikaji Dari Perspektif Living Law." *Lex Renaissance*, No 1, (2019): 40

¹⁹ Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat dalam Wacana dan Agenda*, Cetakan Pertama, (Gema Insani Press, Jakarta, 2003), 124.

²⁰ M. Nurul Irfan and Masyrofah, *Fiqh Jinayah*, (Amzah, Jakarta, 2014), 14.

demonstrates that Islamic criminal law imposes firm penalties to address the act of adultery, reflecting its serious view of the offense.²¹

With various problems that exist about law enforcement against adulterers, it motivates the researcher to discuss this issue and conduct scientific research with the title “*Analysis of Zina Law Provisions in Providing A Deterrent Effect: A Perspective of The Criminal Code And Fiqh Jinayah*”

1.2 Problem Formulation

Based on the background description above the problem of this study can be formulated as follow:

- 1.2.1 What are the differences in the elements and provisions of sanctions for the crime of adultery in The Criminal Code (*KUHP*) and *Fiqh Jinayah*?
- 1.2.2 How effective are the provisions of The Adultery Laq in The Criminal Code (*KUHP*) and Islamic Criminal Jurisprudence (*fiqh jinayah*) in providing a deterrent effect on adulterers?

1.3 Purposes of Reseacrh

The objectives of this study are:

- 1.3.1 Knowing the differences in the provisions of the elements and sanctions of The Adultery Crime in The Criminal Code (*KUHP*) and Islamic Criminal Jurisprudence (*fiqh jinayah*).
- 1.3.2 Knowing the effectiveness of the provisions of The Adultery Law in The Criminal Code (*KUHP*) and Islamic Criminal Jurisprudence (*fiqh jinayah*) in providing a deterrent effect on adulterers.

²¹ Rya Elita Br Sembiring Et Al., "Analisis Tindak Pidana Zina Dalam Reformasi Hukum Pidana dan Qanun Jinayat Aceh" *Iblam Law Review* Volume 4 (2024), 63.

1.4 Benefits of Research

The benefits of research are statements about what is felt once the goal is achieved. The benefits taken from this study are as follows:

1.4.1 Theoretical Benefits:

- 1.4.1.1 It is hoped that this research can be a reference and study material for students in discussion.
- 1.4.1.2 It is hoped that this research can be an additional reference for future thesis.
- 1.4.1.3 To find out the harmony of Islamic criminal law and positive law in dealing with the problem of adultery.

1.4.2 Practical Benefits

- 1.4.2.1 It is hoped that the results of this study can be used as a reference for the renewal and adjustment of the law on adultery to be in line with Islamic Criminal Law.
- 1.4.2.2 It is hoped that the results of this research will be a guideline that is relevant to the life and circumstances of the Indonesian people.

1.5 Previous Research

Previous research serves as a reinforcement and support for the research being conducted by the researcher and to ensure originality and avoid similarities the researcher has compiled a list of prior studies that are relevant to this research.

1. The thesis by Saiful Hadi, titled "Sanctions for Perpetrators of Adultery in the Indonesian Criminal Code (KUHP) and the Qanun of Jinayat Law", was written in 2022. The research methodology used is library research with a qualitative approach. The findings indicate that in the Indonesian Criminal Code (KUHP), adultery is regulated under Article 284, whereas the Aceh Qanun Jinayat regulates adultery under Islamic Criminal Law, categorizing it as Jarimah Hudud. The key difference in this thesis is that it also examines the provisions on deterrent effects in the Indonesian Criminal Code (KUHP) and Islamic Criminal Jurisprudence (Fiqh Jinayah).

Generalization of the Research, This study stems from the differences in legal approaches between Indonesia's national criminal law system (KUHP) and Islamic law (*Fiqh Jinayah*) in addressing the crime of adultery. It examines the effectiveness of adultery laws in both KUHP and Fiqh Jinayah in deterring offenders and their impact on society. Research Novelty, Unlike Saiful Hadi's research, which focuses more on sanction provisions in The Criminal Code (KUHP) and Qanun Jinayat, this study emphasizes the effectiveness of sanctions in deterring offenders. Research benefits, This research aims to raise legal awareness in society regarding the importance of effective regulations in preventing adultery. Research Contribution, It enriches academic literature by discussing the effectiveness of legal sanctions in deterring criminal behavior.

2. The thesis by Dewi Sumarni, titled "Article 284 on Adultery in the Indonesian Criminal Code (KUHP) Reviewed from an Islamic Law Perspective (A Study of Constitutional Court Decision No. 46/PUUXIV/2016)", was written in 2019. The research methodology used is library research with a qualitative approach. The findings indicate that Article 284 of the Criminal Code (KUHP) is considered inconsistent with Islamic legal principles due to its narrow definition of adultery, the requirement for a complaint to initiate legal proceedings, and the relatively light criminal sanctions. The key difference in this thesis is that it also includes a discussion on Article 411 of the new Criminal Code (KUHP).

Generalization of the Research, This study compares Indonesia's national criminal law (KUHP) and Islamic law (*Fiqh Jinayah*) in their effectiveness in deterring adultery offenders. In The Criminal Code (KUHP), adultery is regulated under Article 284, categorizing it as a complaint-based offense with relatively mild sanctions. Meanwhile, in Islamic law, adultery is classified as *jarimah hudud*, carrying stricter punishments aimed at preserving morality and social order. Research Novelty, This study focuses on the effectiveness of sanctions in both legal systems in deterring offenders. Research benefits, It provides a new perspective on the effectiveness of legal regulations in deterring adultery

offenders. Research Contribution This research serves as a reference for academics in understanding the differences in deterrent effects between The Criminal Code (KUHP) and Fiqh Jinayah.

3. The thesis by Nur Amalia Mega Wahyu Utami, titled "A Comparative Analysis of Adultery as a Criminal Offense Under Positive Law and Islamic Criminal Law", was written in 2023. The research methodology used is library research with a qualitative approach. The findings indicate that there are both similarities and differences in how adultery is handled under positive law and Islamic law. The key difference in this thesis is that it also analyzes adultery as a criminal offense in the Indonesian Criminal Code (KUHP) and Islamic Criminal Jurisprudence (Fiqh Jinayah) in terms of its deterrent effect.

Generalization of the Research, This study compares positive criminal law (KUHP) and Islamic criminal law (Fiqh Jinayah) in regulating the crime of adultery. Research Novelty, Unlike Nur Amalia's thesis, which does not discuss recent developments in The Criminal Code (KUHP), this study examines Article 411 of the new KUHP, which introduces changes in adultery regulations. Research benefits, This research serves as a reference for understanding the effectiveness of criminal law in addressing adultery. Research Contribution, It contributes to academic discussions by providing insights into the effectiveness of criminal law in tackling adultery.

4. The thesis by Raka Marhaendra, titled "A Comparative Study of Adultery as a Criminal Offense Under Islamic Criminal Law and Indonesia's Positive Criminal Law", was written in 2022. The research methodology used is literature and library research with a qualitative approach. The findings reveal fundamental differences between the two legal systems, particularly in terms of definition, the nature of the offense, and the imposed sanctions. Islamic Criminal Law takes a stricter approach with harsher penalties, aiming to uphold morality and the sanctity of marriage, whereas Indonesia's Positive Criminal Law is more lenient, treating adultery as a complaint-based offense with relatively light sanctions. The key difference in this

thesis is that it also analyzes the effectiveness of both Islamic Criminal Law and Indonesia's Positive Criminal Law in providing a deterrent effect.

Generalization of the Research, This study compares the legal sanctions for adultery in The Criminal Code (KUHP) and Fiqh Jinayah, focusing on their effectiveness in deterring offenders. **Research Novelty,** This research takes a more specific approach by evaluating the effectiveness of sanctions in preventing adultery in both The Criminal Code (KUHP) and Islamic law. **Research benefits,** It enhances public understanding of the differences in adultery regulations between The Criminal Code (KUHP) and Fiqh Jinayah. **Research Contribution,** The findings can serve as a reference for policymakers in reassessing the effectiveness of adultery regulations in Indonesia

5. The thesis by Abdullah Syifa, titled "A Comparative Study of Adultery as a Criminal Offense in the Old Indonesian Criminal Code (KUHP)", was written in 2023. The research methodology used is normative juridical with a qualitative approach. The findings reveal that the old Criminal Code (KUHP) distinguished adultery based on marital status, whereas the new Criminal Code (KUHP) removes this distinction, making any individual engaged in extramarital sexual relations subject to adultery charges. The key difference in this thesis is that it not only compares adultery as a criminal offense in the old and new of Criminal Code (KUHP) but also examines the differences between adultery regulations in the Criminal Code (KUHP) and Islamic Criminal Jurisprudence (Fiqh Jinayah).

Generalization of the Research, Adultery is a criminal act prohibited in various legal systems, including The Criminal Code (KUHP) and Fiqh Jinayah. **Research Novelty,** This study incorporates perspectives from the new KUHP and Fiqh Jinayah to examine regulatory changes and their effectiveness in deterring offenders. **Research benefits,** It provides new insights into comparative criminal law regarding the effectiveness of adultery sanctions in The Criminal Code (KUHP) and Fiqh Jinayah. **Research Contribution** The findings can serve as a reference for

policymakers in evaluating whether the changes in The Criminal Code (KUHP) are sufficient to effectively deter adultery.

6. The thesis by Nurul Amirah, titled "The Application of the Justice System in the Indonesian Criminal Code (KUHP) to Adultery Crimes from the Perspective of Islamic Criminal Jurisprudance (Fiqh Jinayah)", was written in 2024. The research methodology used is empirical juridical with a qualitative approach. The findings conclude that in Islamic Criminal Jurisprudance (Fiqh Jinayah), the punishment for a married adulterer (muhsan) is stoning (rajm), while for an unmarried adulterer (ghairu muhsan), it is 100 lashes and exile. The key difference in this thesis is that it uses normative research with a qualitative approach.

Generalization of the Research, Adultery is a criminal act prohibited in various legal systems, including The Criminal Code (KUHP) and Fiqh Jinayah. Research Novelty, This study focuses on the extent to which sanctions in The Criminal Code (KUHP) and Fiqh Jinayah are effective in deterring adultery offenders. Research benefits, It raises public legal awareness about the importance of deterrent sanctions in reducing adultery cases. Research Contribution, The findings can serve as a reference for policymakers in evaluating whether the changes in The Criminal Code (KUHP) are sufficient to effectively deter adultery.

1.6 Research Methodology

Research is a process of observing phenomena in depth, after which data is collected and then draws several conclusions. Therefore, a method is needed to obtain authentic and valid data. The best method in this study is to use a qualitative method.²²

1.6.1 Type of research

The type of research used by the author is normative research or also called library research using a normative juridical comparative research approach. That is research that prioritizes data sources from law books, criminal law books (KUHP),

²² Nanang Martono, *Metode Penelitian Kuantitatif* (Jakarta: PT Raja Grafindo Persada, 2014), 8

fiqh books, journals, and also literature related to the study of positive law and Islamic law.²³

1.6.2 Data source

In collecting data in this study, the author uses three data sources, namely:

1.6.2.1 Primary Data

Primary data is a fundamental legal material that directly relates to the research problem and constitutes binding legal material. The primary legal sources used in this study are: The Criminal Code (KUHP), the book *At-Tasyri' al jina'i al Islami* by Dr. Abdul Halim Ali, the book *fiqhul islam wa adillatuhu* by Wahbah Zuhaili and the book *Mausu'ah Al-Ijma' Fi Al-Fiqh Al-Islami* by Muhammad bin Moeid Al-Darras Al-Shahrani.

1.6.2.2 Secondary Data

Secondary data includes all legal publications that are considered unofficial legal sources. These publications consist of books discussing legal issues, including thesis, dissertations, and legal journals.

1.6.2.3 Tertiary data

In addition to primary and secondary legal materials, the author also uses data that is considered necessary in this study. Such as legal dictionary

1.6.3 Data Collection Methods

The data collection methods carried out by the authors to obtain information on this research are:

1.6.3.1 Literature Studies

Literature study is research conducted by studying, reading, and analyzing primary and secondary materials as well as literature related to research.²⁴

²³ Soerjono Soekanto dan Sri Mahmudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Persada, 2003), 13

²⁴ Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1981), 7

1.6.3.2 Document Study

Document study is a way of collecting data that is carried out through documents related to research problems.²⁵

1.6.4 Data analysis methods

The methods used by the author in this study are:

1.6.4.1 Comparative Methods

The comparative method is a method of comparing differences or similarities in ideas, procedures, and perspectives on an event or idea.²⁶

1.6.4.2 Juridical Analysis Methods

The Juridical Analysis method is to analyze the legal provisions in the criminal code and Islamic criminal law. The data that has been collected will be described by the research in the form of a narrative so that it can be understood.²⁷



²⁵ Ibid.

²⁶ Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek* (Jakarta; Rineka Cipta, cet ke-12, 2002), 206

²⁷ Ibid